(2)

FILED
NOV 18 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES S. BARKER and EXPRESS GOLF, INC.,
Petitioners,

vs.

GOLF USA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT GOLF USA, INC.'S BRIEF IN OPPOSITION

TODD TAYLOR
Counsel of Record
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 272-5218 (FAX)

BRADLEY A. WINTERS
Counsel of Record
THOMAS J. GREEN
THOMPSON COBURN
One Mercantile Center
St. Louis, Missouri 63101
(314) 552-6000
(314) 552-7000 (FAX)

Attorneys for Respondent
Golf USA, Inc.

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

1888

QUESTIONS PRESENTED FOR REVIEW

1. Was the Eighth Circuit correct in finding that Oklahoma law governed the Franchise Agreement?

2. Was the Eighth Circuit correct in finding that Oklahoma law does not require mutuality of obligation in arbitration provisions where the underlying contract is supported by consideration?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceedings. There are no parent companies or subsidiary companies to be listed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
I. The Eighth Circuit Correctly Held That Oklahoma Law Governed The Franchise Agreement.	6
II. The Eighth Circuit Correctly Held That Oklahoma Law Does Not Require Mutuality of Obligation in Arbitration Provisions Where The Underlying Contract Is Supported by Consideration.	9
CONCLUSION	13

TABLE OF AUTHORITIES

Page(s)

Cases:

C.H.I. Inc. v. Marcus Bros. Textile, Inc., 930 F.2d 762 (9th Cir. 1991) 11

East Prairie R-2 School Dist. v. U.S. Gypsum Co., 813 F. Supp. 1396 (E.D. Mo. 1993) 9

Electrical and Magneto Serv. Co. v. AMBAC Int'l Corp., 941 F.2d 660 (8th Cir. 1991) 8

High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. 1992) 8

International Union of Operating Engineers, Local 369 v. Office of Professional Employees Union, Local 367, 66 F.3d 325 (6th Cir. 1995) 7

Nakao v. Nakao, 602 S.W.2d 223 (Mo. App. 1980) 9

Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967) 12

Shaffer v. Jeffery, 915 P.2d 910 (Okla. 1996) 5,12

Subway Restaurants, Inc., et al. v. Nancy Kessler, et al., Case No. 90C12370 in the District Court of Johnson County, Kansas 6

Statutes and Other Authorities:

Missouri Merchandising Practices Act RSMo § 407.400 7

Oklahoma Consumer-Protection Act, 15 Okl.St. § 751 7

Restatement (Second) Conflicts of Laws § 187(1) (1988) 9

Supreme Court Rules 8 and 15 6

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Factual Background:

This action arises from a Franchise Agreement entered between Petitioner Express Golf, Inc. ("Express") and Golf USA, Inc. ("Golf USA") dated September 18, 1995 for the purpose of operating a Golf USA retail store utilizing Golf USA's methods, name, designs, system and service marks. (the "Franchise Agreement"); A-31.[1] On the same day, Petitioner Charles S. Barker ("Barker"), entered into an agreement with Golf USA whereby Barker agreed, among other things, to guarantee the performance of Express' obligations under the Franchise Agreement and to arbitrate any disputes thereunder consistent with the terms of the Franchise Agreement. (the "Barker Agreement"); A-80.

In the Franchise Agreement, the parties agreed to the following relevant terms:

> Any and all disputes and controversies arising out of or relating to this Agreement, performance hereunder or breach hereof, except for monies owed to Golf USA pursuant to this Agreement and except as described in Paragraph 18.5, shall be resolved by arbitration conducted in Oklahoma County, State of Oklahoma, in accordance with the latest existing Commercial Rules of Arbitration of the American Arbitration Association.

Franchise Agreement, ¶ 18.1; A-59. Paragraph 18.5 of the Franchise Agreement provides that "[n]othing herein contained shall bar the right of either party to seek and obtain temporary injunctive relief from a court of competent jurisdiction in accor-

---

[1] Citations to the Joint Appendix filed with the United States Court of Appeals for the Eighth Circuit are designated as "A-__".

dance with applicable law against threatened conduct that will cause loss or damage, pending completion of arbitration." Franchise Agreement, ¶ 18.5; A-60. The Franchise Agreement also contains the following provision:

> This Agreement shall be governed by and construed in accordance with the laws of the State of Oklahoma. The parties consent to the jurisdiction of the Oklahoma County District Court and the United States District Court for the Western District of Oklahoma. In the event of any conflict, this section is subordinated to the provisions of Article 18 [i.e., arbitration provision].

Franchise Agreement ¶ 20.1; A-61. Finally, the Franchise Agreement contains the following provision which is provided in 12-point bold-typeface:

> **You acknowledge that You have received a blank copy of this Agreement in time to afford ample opportunity to seek legal counsel, and to analyze the various provisions herein. . . .**

Franchise Agreement ¶ 20.13; A-63.

The Barker Agreement incorporated the arbitration provision of the Franchise Agreement. In the Barker Agreement, Golf USA and Barker agreed to the following provisions:

> 1. Franchise Agreement. The Principals hereby represent and warrant that they have read and understand the Franchise Agreement as a whole and all individual provisions thereof, and acknowledge that their signing of this Agreement is voluntary and as an inducement to Golf USA to enter into the Franchise Agreement with the Franchisee [Express].

* * *

> 7. Enforcement. The provisions of the Franchise Agreement relating to the enforcement thereof are incorporated herein by this reference and shall be fully applicable to the obligations and liabilities of each of the parties hereto.

Barker Agreement ¶¶ 2, 7; A-80 and A-82.

Significantly, Express voluntarily closed its Golf USA retail outlet store less than nine months after execution of the Franchise Agreement because "the store failed financially" and "could not generate sufficient sales to meet expenses." Pet. ¶ 19, A-15. After the store was closed and was no longer in operation, Golf USA followed its standard practice of issuing a notice of termination under the terms of the Franchise Agreement so that the territory assigned to Express could be re-issued to another Franchise. A-88-90.

In an attempt to avoid the arbitration agreement with Golf USA, and to find an advantageous forum, Petitioners filed suit on August 4, 1997 in state court. Pet., A-11. The Petitioners alleged that Golf USA made certain misrepresentations and wrongful omissions related to the operation and success of Express' business under the Franchise Agreement. Pet., A-11.

Procedural Background:

The case was timely removed by Golf USA to the United States District Court for the Eastern District of Missouri. Notice of Removal, A-6. Upon removal, Golf USA filed an alternative Motion to Dismiss, Transfer or Stay. A-18. After Petitioners had an opportunity to file a response to Golf USA's Motion and Golf USA filed a Reply in support of its Motion, the District Court entered its judgment. Petitioners' Response, A-97; Golf USA's Reply, A-121.

The District Court's Memorandum and Order dated November 17, 1997 granted Golf USA's Motion to Dismiss and denied as moot Golf USA's alternative motions to transfer or to stay

pending arbitration. Mem. and Order, A-143. In its Memorandum and Order, the District Court held that the Franchise Agreement was to be governed by the Federal Arbitration Act. Mem. and Order, A-147. The District Court went on to find that the arbitration provision in the Franchise Agreement was broad as it provided for arbitration of all disputes and controversies arising out of or relating to the Franchise Agreement, its performance or breach. *Id.* Accordingly, the District Court held that the Petitioners' claims, relating to misrepresentation and omission of facts regarding Express' operation and success under the Franchise Agreement, related to the Agreement and as a result must be submitted and resolved by arbitration. *Id.* Moreover, the District Court held that the Petitioners' arguments that the arbitration clause is unenforceable because it is contained within a contract of adhesion, fails for want of mutuality and consideration, is unconscionable, and violates public policy were to be "decided by an arbitrator, not the court, because they go to the formation of the entire Franchise Agreement." Mem. and Order, A-148. Even though the District Court held that these issues should be decided by an arbitrator, the District Court addressed and disposed of each of Petitioners' arguments, specifically finding that the arbitration provision did not violate Missouri public policy. Mem. and Order A-148-150.

The District Court then went on to decide whether the case should be dismissed, transferred, or stayed. The Memorandum and Order states, "[w]here all issues in a case must be submitted to arbitration, it serves no purpose to retain jurisdiction and stay an action, or to transfer it to another district." Mem. and Order, A-151. Therefore, the District Court concluded that the matter should be dismissed.[2] *Id.*

[2] After the District Court entered its Memorandum and Order dismissing the case, Golf USA filed a Motion for Attorneys' Fees relating to fees and expenses incurred in connection with the litigation filed by Petitioners contrary to the arbitration agreement. Golf USA's motion has been refiled before the Eighth Circuit seeking Golf USA's attorney's fees and costs relating to this appeal as well.

The Petitioners then filed an appeal with the Eighth Circuit Court of Appeals arguing that the arbitration clause was unconscionable, void and unenforceable; that the arbitration clause violates Missouri public policy; that the arbitration clause lacks mutuality of obligation and is unsupported by consideration; that Golf USA waived its right to compel arbitration by seeking its attorney's fees and costs after dismissal; that state law, rather than federal law should determine the interpretation, formation, validity and enforceability of the arbitration clause; and that Missouri law rather than Oklahoma law should determine the interpretation, formation, validity and enforceability of the arbitration clause. Appellants' Brief at pp. 12-15.

The Eighth Circuit held that because the parties included a choice-of-law provision which stated that the Franchise Agreement shall be governed by and construed in accordance with the laws of the State of Oklahoma, Oklahoma law governed the determination of the validity of the arbitration clause. Pet. App. at p. 52. The Eighth Circuit recognized the Petitioners' argument that the choice-of-law provision should be set aside stating: "No persuasive reason having been advanced for setting aside the choice-of-law provision upon which the parties agreed in their contract, we reject this argument and conclude that Oklahoma law applies." *Id.*

The Eighth Circuit also held that the Oklahoma Supreme Court would not separately require mutuality of obligation in arbitration clauses based on the Oklahoma Supreme Court case of *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996). Pet. App. at p. 73. Accordingly, the Eighth Circuit affirmed the District Court's dismissal of the Petitioners' lawsuit.

The Petitioners then filed a Petition for Rehearing and for Rehearing *en Banc* which was denied by the Eighth Circuit on September 29, 1998.

REASONS FOR DENYING THE WRIT

As an initial matter, it should be noted that the Petitioners' Petition may not be properly before this Court. Supreme Court Rule 5 states that any person qualified to practice before this Court must not have been the subject of any adverse disciplinary action pronounced or in effect three years before the date of admission. Petitioners' counsel, David M. Duree, has been sanctioned seven times by four different courts and has been referred to the disciplinary authorities in Illinois and Missouri (the states in which he is licensed) after his *pro hac vice* admission in Kansas was revoked by a Kansas trial judge in the case of *Subway Restaurants, Inc., et al. v. Nancy Kessler, et al.*, Case No. 90C12370 in the District Court of Johnson County, Kansas, and he was fined $408,445.25 after finding that he had "deliberately caused to be prepared a false [federal income] tax return for use in . . . litigation." Although the matter is currently on appeal to the Kansas Supreme Court, Golf USA feels that it has an obligation to bring this matter before the Court's attention under Supreme Court Rules 8 and 15.

I. The Eighth Circuit Correctly Held That Oklahoma Law Governed The Franchise Agreement.

The Petitioners admit, in their Petition, that they closed their store during June, 1996 because the store failed financially and could not generate sufficient sales to meet expenses. Pet. at p. 5, ¶ 21; A-15.

The Petitioners make a convoluted argument that the parties' choice of law provision which states that Oklahoma law governs the Franchise Agreement should be set aside because it somehow violates a public policy of the State of Missouri. Initially, the Petitioners argued to the Eighth Circuit that the choice of law provision violated Missouri public policy simply because it contained a choice of law provision other than Missouri on the theory that Missouri's "paternalistic" Franchise Act prohibits

the application of the law of any state other than Missouri for contracts entered by Missouri franchises. As Golf USA pointed out in its Response to Petitioners' Petition For Rehearing and Rehearing *En Banc*, Missouri has enacted the Missouri Merchandising Practices Act RSMo. § 407.400 *et seq.*, not a "Missouri Franchise Act" which is a consumer protection statute not unlike the Oklahoma Consumer-Protection Act, 15 Okl.St. § 751, *et seq.*, and that the mere existence of the Missouri Merchandising Practices Act does not render all choice of law provisions other than Missouri *per se* void as violative of a fundamental public policy of the State of Missouri.

Petitioners now argue, for the very first time, that the choice of law provision violates a fundamental public policy of the State of Missouri because the Missouri Merchandising Practices Act requires 90 days notice for the termination of franchises whereas the Franchise Agreement simply required 24-hour notice of termination. This argument is raised in the Petition for a Writ of Certiorari despite the fact (1) that it was not raised before the District Court or the Eighth Circuit; (2) more importantly, the termination provision of the Franchise Agreement was not implicated in this suit because the Petitioners voluntarily closed their Franchise; and (3) even if the termination provision conflicted with the Missouri Merchandising Practices Act, if it were violated, the arbitration panel would apply the Act and award the appropriate damages. Therefore, the termination provision in no way impacts whether this case should be submitted to arbitration or litigation.

Quite simply, Golf USA did not terminate the Petitioners, therefore, the alleged violation of a fundamental public policy of the State of Missouri is hypothetical, inapplicable and not a sound basis for appeal. *See International Union of Operating Engineers, Local 369 v. Office of Professional Employees Union, Local 367*, 66 F.3d 325, (6th Cir. 1995) (alleged public policy violation based on a hypothetical situation is meritless).

Further, the cases cited by the Petitioners in support of their claim that the choice of law provision violates a fundamental public policy of the State of Missouri are inapplicable. *Electrical and Magneto Serv. Co. v. AMBAC Int'l Corp.*, 941 F.2d 660 (8th Cir. 1991), actually involved a factual situation in which a franchisor terminated a franchisee without giving the statutory notice required under the Missouri Merchandising Practices Act. *Id.* at 661. *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493 (Mo. 1992), involved a Missouri statute which provides that no licensed liquor distributor may be terminated except for good cause. *Id.* at 498. Under the forum selection provision contained in the distributorship agreement involved in that case, the franchisee would have been required to bring suit in Kentucky which did not afford the same protections. *Id.* at 495. The Franchisor terminated the Franchisee without good cause and the Court found that applying the forum selection clause would violate a fundamental public policy of the State of Missouri in regulating its liquor distributors. *Id.* at 498. The Court, however, specifically held that Missouri should no longer treat outbound forum selection clauses as *per se* violations of public policy. *Id.* at 496. Here, the Petitioners have failed to establish that the parties' choice of law provision violates any fundamental Missouri public policy.

Finally, even if the termination provision had been implicated in this suit, it would not have affected the issue of whether this case should be submitted to arbitration. For example, if Golf USA had terminated the Petitioners' Franchise Agreement in violation of the Missouri Merchandising Practices Acts' 90 days notice provision, the Petitioners could present evidence of this violation to the arbitration panel for their consideration and ruling. This issue, however, is purely hypothetical since Golf USA did not terminate the Franchise Agreement. Nonetheless, it is clear that the parties' choice of law provision in no way violates a fundamental public policy of the State of Missouri.

In the absence of a violation of a fundamental public policy of Missouri, Missouri choice of law rules apply the law of the State chosen by the parties to govern their contractual rights and duties. *See East Prairie R-2 School Dist. v. U.S. Gypsum Co.*, 813 F. Supp. 1396, 1401 (E.D. Mo. 1993); *Nakao v. Nakao*, 602 S.W.2d 223, 226 (Mo. App. 1980); Restatement (Second) Conflicts of Laws § 187(1) (1988). In this case, the parties chose the law of Oklahoma to govern their contractual rights and the Eighth Circuit correctly held that Oklahoma law governed the Franchise Agreement.

II. The Eighth Circuit Correctly Held That Oklahoma Law Does Not Require Mutuality of Obligation in Arbitration Provisions Where The Underlying Contract Is Supported by Consideration.

Petitioners argue that the arbitration provision of the Franchise Agreement is void because it lacks mutuality of obligation and is unsupported by consideration. However, the arbitration provision does not lack mutuality of obligation and was supported by consideration. The plain language of the arbitration clause excepts from arbitration only those instances in which money due Golf USA pursuant to the Franchise Agreement is owed:

> Any and all disputes and controversies arising out of or relating to this Agreement, performance hereunder or breach thereof, *except for monies owed to Golf USA pursuant to this Agreement* and except as described in Paragraph 18.5, shall be resolved by arbitration . . . .

Franchise Agreement ¶ 18.1; A-59 (emphasis added). This clause does *not* exempt all conceivable claims as the Petitioners contend. In fact, the clause covers only three terms in the Franchise Agreement which contemplate money owed to Golf USA: the franchise fee, the royalty fee, and advertising fee. *See*, Franchise Agreement, ¶¶ 3.1, 7.1, and 12.6; A-33, 38 and 49.

Those are the only instances in the contract which contemplate "monies owed to Golf USA." There is a fourth instance in which money may be owed to Golf USA, however, it is applicable only if the Franchise Agreement is terminated and the Petitioners fail to comply with the termination provisions, in which case Golf USA would be entitled to liquidated damages until the franchisee complies with the provisions of the termination clause. The termination clause requires such things as executing documents to release their rights to territories, use of the name Golf USA, the transfer of telephone listings, abiding by covenants not compete and confidentiality agreements, etc. *See* Franchise Agreement, ¶ 16.7, A-56-57.

The Franchise Agreement is replete with provisions under which the arbitration clause could apply to both parties. Indeed, dozens of potential claims could be conceived by Golf USA against the Petitioners which are not excluded from the arbitration agreement. For example, Article 2, section 2.2.3 (p. 2, A-32), reads: "If You relocate your Store, You will have to conform the new Store to the then current standards of basic store design for new franchises." Franchise Agreement, ¶ 2.2.3, A-32. Had the Petitioners relocated their store without any consideration for current basic store design and trade dress standards and Golf USA sought to enforce this section, it could not have done so in any manner other than arbitration unless there was a basis for injunctive relief or Golf USA sought to terminate the entire business relationship. Quite simply, failure to abide by this section does not constitute "monies owed to Golf USA pursuant to this Agreement." As such, the arbitration clause is fully applicable, as it is in nearly all possible breaches of the Franchise Agreement (other than payment of franchise, royalty, and advertising fees).

The Petitioners argue that because Article 16, Section 16.4.2 of the Franchise Agreement allows Golf USA to terminate the agreement if the Petitioners fail to cure a default which "materi-

ally impairs the good will associated with the Golf USA name, service mark or logo" after 24 hours written notice that it, in effect, allows Golf USA to sue for monies owed for any alleged breach of the Franchise Agreement and bring suit in court. This position, however, fails to recognize that if the Petitioners were in breach of the Franchise Agreement and Golf USA wanted them to comply with the terms of the contract but did not want to terminate the whole agreement, they would be required to submit its claims to arbitration. Further, if the Petitioners breached the Franchise Agreement but did not owe Golf USA any money under the agreement and otherwise complied with the provisions of Article 16, Section 16.7, they would not owe money under the Franchise Agreement. Therefore, the arbitration provision does not lack mutuality of obligation.

The District Court also disagreed with the Appellants' contention that the arbitration clause lacks mutuality of obligation. The District Court correctly noted that in order for there to be mutuality, it is not necessary that both parties be required to arbitrate every type of claim under an agreement. Rather, "[i]t is sufficient if both parties agree to arbitrate some claims." Mem. and Order, p. 7; A-149. The District Court also held that the parties had agreed to arbitrate most claims arising under the Franchise Agreement, with the exception of claims for monies owed by Petitioners and that: "As a result, sufficient mutuality of obligation exists." Mem. and Order, p. 8; A-150 (citing *C.H.I. Inc. v. Marcus Bros. Textile, Inc.*, 930 F.2d 762, 764 (9th Cir. 1991)).

As noted above, Petitioners' argument that Golf USA has not promised to arbitrate any claim is simply wrong. Only claims for monies owed to Golf USA *pursuant to the Franchise Agreement* are exempted from the arbitration clause. Petitioners' action does not involve a claim for monies owed under the Franchise Agreement.

Furthermore, there was no reason to make this exception to the arbitration clause mutual since no provision of the Franchise Agreement obligates Golf USA to pay money to the Petitioners. Therefore, a mutual term for the Petitioners to seek amounts due pursuant to the Franchise Agreement in court would have been meaningless since the Franchise Agreement does not contemplate any monies being paid to the franchisee by Golf USA. Additionally, the inclusion of such a meaningless provision would have been confusing and may have unnecessarily created an ambiguity in the Franchise Agreement. As the District Court found, Petitioners' arguments concerning lack of mutuality and consideration are simply without merit.

Even though the arbitration provision does not lack mutuality of obligation, the majority opinion recognized that the Oklahoma Supreme Court would not even require mutuality of obligation in arbitration clauses based on the decision of *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996). In *Shaffer*, the Oklahoma Supreme Court recognized that the separability doctrine established by *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967) did not apply under the Oklahoma Arbitration Act and that under Section 802 (A) of the Oklahoma Arbitration Act, which provides that arbitration clauses are valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract, applies not only for arbitration agreements but also to contracts containing arbitration agreements. *Id.* at 917. Since the issue before the Court was whether the Oklahoma Arbitration Act would require mutuality of obligation not whether the Federal Arbitration Act requires mutuality of obligation, the majority opinion in no way conflicts with this Court's opinion in *Prima Paint*.

Since Oklahoma law governs the contractual relationship between Golf USA and the Petitioners, the majority did not err in finding that mutuality of obligation would not be required under Oklahoma law. Accordingly, the Petitioners' Petition for a Writ of Certiorari should be denied.

CONCLUSION

For each of the reasons set forth above, this Court should deny the Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

Todd Taylor
Counsel of Record
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City,
Oklahoma 73102
(405) 235-7700
(405) 272-5218 (FAX)

Bradley A. Winters
Counsel of Record
Thomas J. Green
THOMPSON COBURN
One Mercantile Center
St. Louis, Missouri 63101
(314) 552-6000
(314) 552-7000 (FAX)

Attorneys for Respondent
Golf USA, Inc